

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

WEST ROOFING SUPPLY COMPANY, INC. ^{1/}

Employer

and

Case 9-RC-17575

TEAMSTERS LOCAL 89, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, ^{2/} the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

^{1/} The name of the Employer appears as amended at the hearing.

^{2/} The Employer and the Petitioner timely filed briefs which I have carefully considered in reaching my decision.

5. The Employer is engaged in the sale ^{3/} of roofing materials at its Louisville, Kentucky facility, the only facility at issue in this proceeding, where it employs 25 individuals including 14 employees in the unit found appropriate.

The Petitioner seeks to represent a unit of eight drivers, four warehouse employees and a warehouse lead man. ^{4/} The Employer agrees that the drivers and warehouse employees should be included in any unit found appropriate but it maintains that the warehouse leadman, Roger Yokley, should be excluded from the unit as a supervisor within the meaning of Section 2(11) of the Act. ^{5/} Moreover, contrary to the Petitioner, the Employer also contends that two counter employees, Ray Stettenbenz and Shawn Asberry, should be included in the unit.

John Thomas, general manager, is the Employer's highest ranking official at its Louisville facility and is responsible for the overall supervision of that operation. Jerry Medley, assistant manager; Brian McCormick, sales manager; Doug Smith, purchaser; and Rachel Johnson, receptionist, report directly to Thomas. The two counter employees and the eight drivers report directly to Medley who also supervises the four warehouse employees and the warehouse leadman. ^{6/} McCormick supervises five outside sales employees. ^{7/}

The Employer's Louisville facility is located on four acres containing a main building which house its sales floor, office space and a warehouse. Outside of the main building are sheds and paved open areas where product is stored.

The counter employees work together at a sales counter on the sales floor where both of them have a computer, a telephone and a cash register. Counter employees are responsible for taking orders from walk-in customers and by telephone. If merchandise for a walk-in customer is available on the sales floor, the counter person will assist in loading the merchandise in the customer's vehicle. Occasionally, a counter person will retrieve small items of merchandise from the warehouse for a walk-in customer. If a walk-in customer orders a large item located in the

^{3/} The record indicates that the Employer's sales are predominately nonretail to lumber yards and building contractors.

^{4/} Joe Miles is classified as a driver/warehouse employee but he is not among the group of the four warehouse employees and the warehouse leadman who are regularly assigned on a rotating basis to clean up or delivery assistance duties. Accordingly, I have designated Miles as being in the drivers group. In any event, Miles is undisputedly included in the group of warehouse employees and drivers who the parties agree should be included in any unit found appropriate.

^{5/} Although Yokley's official title is warehouse manager, the record reflects that most of the employees refer to him as the leadman.

^{6/} As noted above, the parties disagree as to the supervisory status of the warehouse leadman. There is, therefore, a dispute as to who is the immediate supervisor of the warehouse employees. It is undisputed that Yokley, the warehouse leadman, reports directly to Medley.

^{7/} The parties stipulated, the record reflects and I find that Thomas, Medley and McCormick are supervisors within the meaning of Section 2(11) of the Act. Accordingly, they are excluded from the appropriate unit. The parties further stipulated and I find on the basis of the record that the five outside sales employees, the purchaser and the receptionist lack a sufficient community of interest to warrant their inclusion in any unit found appropriate.

warehouse, the counter person gives the customer a ticket which the customer takes to a warehouse employee who retrieves the merchandise and loads it in the customer's vehicle. The receptionist answers incoming telephone calls and directs customers wishing to place an order primarily to the counter employees but occasionally to an outside sales employees. As previously noted, the counter employees take telephone orders from the customers but the record does not reflect how these telephone orders are processed. The counter employees prepare invoices for the orders they take but the record does not reflect how the invoices are processed. Finally, the counter employees perform a daily cash reconciliation.

The warehouse employees wait on walk-in customers who have received a ticket from a counter employee, unload and store incoming merchandise, assemble, stage and load orders for delivery by the drivers, accompany drivers on deliveries to assist with unloading, perform cleanup duties and rearrange merchandise in the warehouse and other storage areas. The warehouse employees use paperwork located on clipboards to determine which product to stage into loads for delivery by the drivers. However, the record does not reflect the nature of this paperwork, how it is created or the manner in which it is processed.^{8/} It appears that each driver is assigned to a particular truck and that the paperwork on the clipboard indicates on which truck the merchandise is to be loaded. The process of staging merchandise for delivery was also referred to on the record to as pulling orders or pulling clipboards.

Yokley was promoted to warehouse lead man in August 2000 from a warehouse employee position. The payroll transaction form reflects that Yokley was promoted to the position of warehouse manager and that he received a wage increase from \$10.50 per hour to \$12.00 per hour. Yokley currently earns \$12.25 per hour. At the time of the promotion, Thomas told Yokley that his responsibilities would include directing warehouse personnel and drivers on what needed to be done in the warehouse. When new warehouse employees are hired they are introduced to Yokley by Thomas or Medley. The new employees are told that Yokley is the warehouse manager and that they should speak with Yokley about their questions and concerns but if they remain unsatisfied, they can bring their questions or concerns to Thomas or Medley.

Yokley assigns specific tasks to warehouse employees to perform within the warehouse, such as pulling orders, loading trucks for deliveries, unloading and storing incoming product, accompanying drivers on deliveries, clean up, rearranging stock and waiting on walk-in customers. Steve Braden, a warehouse employee whose tenure in the warehouse is second only to Yokley, initially testified that Yokley never assigned him any work. Braden explained that due to his lengthy tenure, he knows what he should be doing in the warehouse and that no one has to instruct him on his duties. He further related that Medley talks to warehouse employees about "things" that need to be done a couple of times a week and that occasionally, Yokley informs warehouse employees of Medley's requests that certain tasks be accomplished in the warehouse. Braden acknowledged, however, that Yokley makes "requests" that he and other warehouse employees perform specific tasks at specific times in the warehouse and that warehouse employees are obligated, to avoid getting in trouble, to perform those tasks. Except as noted below, the record does not specify the frequency of these assignments or whether Yokley's judgment is circumscribed.

^{8/} Medley, the assistant manager, was also referred to on the record as the dispatcher.

Yokley created and maintains a list of employees assigned to perform cleanup duties on a specific day of the week. The four warehouse employees and Yokley are each permanently assigned to perform cleanup on the same weekday each week. If an employee is absent on his assigned cleanup day, Yokley may adjust the schedule or decide to forego the cleanup for that day. The record does not reflect who decided that each warehouse person would perform cleanup up once a week or how that decision was made.

Yokley created ^{9/} and maintains a form used to record historical information concerning warehouse employees who have been assigned to accompany drivers on deliveries. The record shows that there were 43 such assignments in 2001 made on an irregular as needed basis. These assignments are equalized among the four warehouse employees and Yokley. The record does not indicate who made the decision to equalize these assignments or how that decision was made. Although the record indicates that Yokley created the form and set up the procedure on his own, it does not specify whether the procedure he set up was the recording of the information or the equalization of the assignments or both.

Yokley is responsible for maintaining an efficient layout of product in the warehouse and other storage areas. He supervised the installation of new storage racks and bins and assigned warehouse employees to perform that installation. Yokley also decides how merchandise may be more efficiently arranged in the warehouse and assigns warehouse employees to rearrange it. Yokley supervised such rearrangements many times over several months prior to the hearing in this matter.

Yokley schedules lunch and break periods for the warehouse employees and may approve or disapprove their requests to report to work late or to leave work early. Employees calling in to notify the Employer that they will be absent or tardy are transferred to Medley or Yokley so that the work assignments for the day may be adjusted.

The Employer has a progressive disciplinary policy providing for verbal warnings, suspensions and discharges. Thomas testified that Yokley has the authority to discipline employees up to and "not excluding" discharge but that he has never exercised that authority. Yokley, as a supervisor, signed Employee Disciplinary Reports dated September 13, 2001 in which verbal warnings were issued to warehouse employees Josh Wisner and Mike McGinnes for tardiness. The warning given to Wisner was at the suggestion of Thomas and Medley. It appears that someone (probably Yokley) had talked to McGinnes about his tardiness problem on a number of occasions over a period of a few weeks prior to September 13, 2001. On September 10, 2001, Thomas and Yokley talked about giving McGinnes a warning and on September 13, 2001, Thomas instructed Yokley to issue the verbal warning to McGinnes in writing. Shortly after Yokley became the warehouse lead person, he was present when Medley issued a verbal warning to Steve Braden, a warehouse employee, for being tardy. Braden's warning was never reduced to writing. Shortly after Yokley's August 2000 promotion, he recommended that Steve Duvall be discharged due to slow work. As an apparent result of this

^{9/} The transcript is hereby corrected on page 37 line 15 by inserting the word "no" between the words "had" and "influence."

recommendation, Medley warned Duvall about his slow work. Several months later, Thomas and Medley decided to discharge Duvall because he refused to pick up return material from a customer.^{10/} Yokley was not involved in Duvall's termination.

Yokley is not involved in decisions concerning hiring, promotions, vacations, sick leave or wage increases. The Employer has never laid off an employee at its Louisville facility.^{11/}

Yokley has a desk in the warehouse where he keeps his "paperwork." No other warehouse employee has a desk. Yokley makes arrangements with a specific outside vendor for preventative maintenance and minor repairs to fork lift equipment. However, he must obtain approval from Medley for larger repairs.^{12/} The remainder of his time, approximately 80 to 85 percent of his time, he performs the same manual tasks as the other warehouse employees.

Like the warehouse employees, drivers, counter employees and the receptionist, Yokley works from 7 a.m. to 5 p.m. on Monday through Friday, is hourly paid and punches a time clock.^{13/} A driver, a warehouse employee and a counter employee work from 7:30 a.m. to 11:30 a.m. on Saturdays and it appears that these Saturday assignments are rotated among the employees in each of the three groups and that some outside sales employees may be involved in the Saturday counter rotation. As noted above, Yokley earns \$12.25 per hour. Steve Braden, an experienced warehouse employee, earns \$11.00 per hour. The top drivers earn about \$13.00 per hour. Ray Stettenbenz, a counter employee, earns \$13.65 per hour. The outside sales employees are responsible for making sales calls on customers and their time spent at the Louisville facility varies widely. The record does not reflect how the outside sales employees are compensated. Thomas and Medley are salaried. Yokley wears a uniform as do the warehouse employees and the drivers. The counter employees, receptionist, outside sales and management do not wear uniforms. All of the people working at the Louisville facility share the same benefits, parking lot and break room.

Drivers Carl Jewell and Kenneth Sears transferred to their current positions from the warehouse. Ray Stettenbenz, a counter person, began his employment as a warehouse employee for 2 years, then became a driver for 8 years before transferring to the counter about 2 years prior to the hearing.^{14/} As a consequence of this prior experience, Stettenbenz fills in making deliveries for drivers when they are short handed about 3 to 4 times per month and fills in for warehouse employees about 2 to 3 times a month. Outside sales employees fill in for counter

^{10/} Employer's Exhibit 4 indicates that the refusal occurred on July 16, 2001.

^{11/} Thomas testified that he and Medley make layoff and recall decisions if needed but they would consider recommendations made by Yokley. The record does not reflect what, if any, weight might be given to Yokley's recommendations in such a hypothetical situation.

^{12/} Whatever involvement Yokley might have had in suggesting the purchase of vinyl forklift enclosures was before his August 2000 promotion and has no bearing on his supervisory status.

^{13/} Shawn Asberry, a counter employee, reports for work at 8 a.m. and occasionally leaves before 5 p.m.

^{14/} Chuck Freeman, a former counter employee, also worked as a warehouse employee and driver before becoming a counter employee and while a counter employee, Freeman assisted with driving and warehouse duties.

employees but the record does not reflect how frequently this happens. Warehouse employees and drivers do not fill in on the counter. Counter employees do not fill in for outside sales.

Warehouse and counter employees move product from the warehouse to replenish stock on the sales floor. Drivers assist warehouse employees in loading and unloading trucks. The Employer furnishes a cell phone to Stettenbenz, a counter employee, so that drivers may contact him concerning problems with deliveries. Medley is the primary contact for the drivers but in Medley's absence, Stettenbenz assists them. Steve Braden, a warehouse employee, testified that he visits the counter area about 4 or 5 times a day to turn in tickets or speak to Stettenbenz about problems with orders.

ANALYSIS:

For the reasons set forth below, I find that Yokley possesses authority in the interest of the Employer to discipline employees and/or effectively recommend that disciplinary action be taken. He also uses independent judgment in assigning and directing employees' work in the interest of the Employer. I further conclude that the counter employees share a substantial community of interest with the warehouse employees and drivers requiring their inclusion in the unit.

Yokley's Supervisory Status:

Section 2(11) of the Act defines a supervisor as a person:

... having the authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Entergy Systems & Services*, 328 NLRB 902 (1999), the Board held that the authority involved in any of the functions enumerated in Section 2(11) must be in the interest of the employer and require the use of independent judgment, that the statutory language is to be read in the disjunctive and that the possession of any one of the indicia is sufficient to confer supervisory status. The party asserting supervisory status has the burden of proving such status. *NLRB v. Kentucky River Community Care*, ____ U.S. ____, 121 S. Ct. 1861 (2001). It is the *possession* of authority defined in Section 2(11) rather than its *exercise* which is determinative of supervisory status. *Wilson Tree Company*, 312 NLRB 883, 885 (1993); *Grove Truck and Trailer*, 281 NLRB 1194 (1986).

It is noted, however, that in enacting Section 2(11) of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” See, **Senate Rep. No. 105, 80th Cong., 1st Sess. 4**, reprinted in

1 NLRB Legislative History of the Labor Management Relations Act, 1947. See also, *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985); *NLRB v. Bell Aerospace Co.*, 416 NLRB 267, 280-281, 283 (1974). Although the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, such authority must be exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, the exercise of “supervisory authority” in merely a routine, clerical or perfunctory manner does not confer supervisory status. *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985); *Chicago Metallic Corp.*, supra; *Advanced Mining Group*, 260 NLRB 486, 507 (1982). Moreover, in the event that “the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Thomas testified that Yokley possesses the authority to discipline employees, up to but not excluding discharge but that he has never exercised that authority. The record does not contain evidence to the contrary. The record shows that Yokley exercised his judgment to determine that Steve Duvall was too slow in performing his work and recommended that Duvall be discharged. The recommendation resulted in Duvall receiving a warning. Thus, the evidence shows that Yokley's exercise of judgment resulted in an employee being disciplined. Although Thomas and Medley appear to be the moving forces behind the warnings issued to Braden, Wisner and McGinnes, Yokley was also involved in the issuance of those warnings. The evidence is unclear whether Yokley's involvement amounted to effective recommendation but his participation demonstrates that the Employer, as well as the affected employees, would look to Yokley as having a role in the disciplining of employees. Thus, Yokley's participation in the issuance of these warnings would tend to support Thomas' testimony that Yokley had the authority to discipline employees but has never exercised it. The fact that Yokley's participation might not have risen to the level of effective recommendation is entirely consistent with the notion that he possessed authority which he was reluctant to exercise. Accordingly, I conclude that Yokley possesses authority to discipline employees.

With respect to most of the Section 2(11) indicia, the use of independent judgment is self evident, as was the judgment used by Yokley to determine that Duvall's work was too slow. However, when considering the supervisory authority to assign employees and responsibly direct their work it is more difficult to define the use of independent judgment. This difficulty was addressed by the Supreme Court in *Kentucky River*, supra.^{15/}

Although the Supreme Court in *Kentucky River* rejected the Board's categorical exclusion of independent judgment, it did accept two aspects of the Board's interpretation of independent judgment. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. at 1867. Initially, the Court agreed with the Board that independent judgment is ambiguous, that many nominal supervisory functions may be performed without the exercise of such a degree of judgment or discretion as would warrant a finding of supervisory status under the Act and that

^{15/} Although the *Kentucky River* decision involved the supervisory status of professional employees in a health care setting, the Board applied *Kentucky River* to nonprofessional employees in a nonhealth care setting in *Dynamic Science*, 334 NLRB No. 57 (2001).

the Board has discretion to determine the scope of judgment that qualifies as independent judgment within the meaning of Section 2(11) of the Act. Secondly, the Court recognized that judgment may be reduced below the statutory supervisory threshold by detailed regulations issued by an employer. *Id.* Moreover, the *Kentucky River* Court suggested that the Board, as it did in *Providence Hospital*, 320 NLRB 717, 729 (1996), might draw a distinction between employees who direct the manner of others' performance of discrete tasks from employees who direct other employees. *Id.* at 1871.

Where the assignment and direction of work is significantly constrained by detailed written and oral instructions issued by a superior to the individual whose supervisory status is in question, as was the case in *Dynamic Science*, *supra*, decided in the wake of *Kentucky River*, the assignment and direction is deemed to require a degree of judgment falling below the threshold required to establish supervisory status.^{16/} Furthermore, there is a distinction between employees who direct the manner of others' performance of discrete tasks from employees who direct other employees. Under this distinction, recognized by the Supreme Court in *Kentucky River*, *supra*, and the Board in *Providence Hospital*, *supra*, it would appear that instructions given by individuals to employees as to the manner in which a specific task is to be accomplished are deemed to be routine, while decisions as to which tasks are to be performed and when they will be accomplished are deemed to require the use of independent judgment. The former routine instance involves dispensing knowledge as to how a particular task should be accomplished without requiring decisions as to when tasks will be performed and by whom. Accordingly, the authority to assign and direct work will be deemed to require the use of independent judgment unless the authority is constrained by instructions from higher authority or is limited to the routine dispensing of knowledge as to the manner in which a discrete task should be performed. See, *Beverly Health and Rehabilitation Services*, 335 NLRB No. 54, slip op. at n. 3 and pp. 35-36 (2001).

The evidence reveals that Yokley's assignment of cleanup and delivery assistance duties is constrained by a system designed to equalize those assignments among the warehouse employees on a rotating basis but it does not disclose how and who implemented that system in the first instance. The record is, therefore, insufficient to establish that Yokley exercised any independent judgment in establishing the rotational system and his administration of the system does not require the use of independent judgment because the equalization of work assignments on a rotational basis is deemed to be routine. *Providence Hospital*, 320 NLRB at 727.

The record discloses, however, that Yokley possesses discretion to decide which employees will perform such tasks as pulling orders, loading trucks for deliveries, unloading and storing incoming product, rearranging stock, waiting on walk-in customers, and when those tasks will be performed. Thus, Yokley's assignment and direction of employees extends beyond merely dispensing knowledge as to the manner in which these discrete tasks should be

^{16/} This notion is consistent with *John N. Hansen, Co.*, 293 NLRB 63, 64 (1989), cited by the Petitioner in its brief for the proposition that supervisory status is not conferred where assignment and direction of work is limited to repeating instructions given by a higher authority, acting as a conduit for relaying management instructions to other employees. However, the facts of *Hansen* are distinguishable from those in the case at bar because, as noted below, the record does not support the Petitioner's factual assertion that Yokley's role is limited to acting as a conduit for Medley's instructions.

accomplished and involves decisions as to when and by whom they should be performed. In addition, the record does not contain evidence that Yokley's authority to assign these tasks to particular employees at particular times is constrained by instructions from his superiors. Although the evidence suggests that Yokley may occasionally relay Medley's instructions to employees and that Medley may directly instruct employees in their work duties, the record also shows that Yokley has actually exercised authority to independently decide which tasks should be performed by specific employees at specific times and to implement those decisions by assigning the work to employees. The frequency that Yokley actually exercises his authority to assign work is not determinative of his supervisory status. If an individual is vested with supervisory authority, the sporadic exercise of such authority does not detract from a supervisory finding. *Capital Transit Company*, 114 NLRB 617 (1957); *Beverly Enterprise-Massachusetts, Inc. v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999). Here, the evidence, in the form of Braden's testimony, shows that employees are obligated to follow Yokley's instructions regarding job assignments in order to avoid getting into trouble, thereby establishing that Yokley possesses authority to independently assign and direct their work.

Although the record does not reflect the process by which Yokley decides whether to approve or deny employees' requests to arrive at work late or leave early, I infer that such a decision, of necessity, would require Yokley's evaluation of the need for the employee's presence at work against the employee's need for time off, therefore requiring the use of independent judgment as the term is defined in *Kentucky River*.

In support of its argument that Yokley's assignment and direction of work does not confer supervisory status on him, Petitioner relies on *Millard Refrigerated Services*, 326 NLRB 1437 (1998) and *Esco Corp.* 298 NLRB 837, 839 (1990) where the Board held that the assignment of employees to pull orders, load and unload trucks and store materials does not involve the use of independent judgment. These precedents, having been decided without the benefit of *Kentucky River*, supra, are inapposite to my analysis in the instant matter because they did not involve consideration of whether such assignments are limited to directing the manner in which discrete tasks are to be accomplished as opposed to making independent decisions as to when and by whom specific tasks should be performed. Similarly, *Manimark Corp.*, 307 NLRB 1059, 1061 (1992); and *Amperage Electric*, 301 NLRB 5, 14 (1991) are inapposite because they decided without the benefit of *Kentucky River*. Moreover, there were no employees in *Manimark*, over whom the individual at issue might be a supervisor.

Inasmuch as I have concluded that Yokley possesses authority to discipline employees and to assign and direct their work requiring the use of independent judgment, I find that he is a supervisor within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude him from the unit found appropriate.

Counter Employees' Community of Interest:

Section 9(a) of the Act only requires that a unit sought by a petitioning labor organization be an appropriate unit for purposes of collective bargaining, and there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit or even the most appropriate unit. *Morand Brothers Beverage Company*, 91 NLRB 409, 418

(1950). Moreover, the unit sought by the petitioning labor organization is always a relevant consideration and a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to that requested does not exist. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Purity Food Stores*, 160 NLRB 651 (1966).

The appropriateness of a given unit is governed by community of interest principles. In analyzing community of interest among employee groups, the Board considers bargaining history; functional integration; employee interchange and contact; similarity of skills, qualifications and work performed; common supervision; and similarity in wages, hours, benefits and other terms and conditions of employment. *Armco, Inc.*, 271 NLRB 350 (1984); *Atlanta Hilton & Towers*, 273 NLRB 87, 89 (1984); *J.C. Penney Co.*, 328 NLRB 766 (1999). In addition, the Board considers whether the employees, if excluded, would constitute a separate appropriate unit or would be more appropriately included with other employees not within the unit. *Overnite Transportation Co.*, supra.

Medley is the lowest ranking supervisor common to the drivers and warehouse employees sought by the Petitioner. The counter employees are the only other employees under Medley's supervision. This commonality of supervision is a factor which militates towards requiring the inclusion of the counter employees in the unit sought because to permit their exclusion would fragment the group of employees under Medley's supervision.

Moreover, the counter employees' hours are very similar to those of the drivers and warehouse employees and they share the same benefits. The evidence shows that the earnings of the drivers are closer to those of the counter employees than they are to the warehouse employees. Thus, in terms of wages, the drivers share a closer community of interest with the counter employees whom the Petitioner would exclude from the unit than they do with the warehouse employees whom the Petitioner would include.

In addition, the work of the counter employees is functionally integrated with that of the warehouse employees in the unit. The counter employees give a ticket to walk-in customers who take the ticket to warehouse employees to have their orders filled. Counter employees occasionally retrieve product from the warehouse for walk-in customers and both counter employees and warehouse employees participated in replenishing the sales floor with stock from the warehouse. Although the record does not specify the manner in which telephone orders taken by the counter employees are further processed, it would appear that they are filled by someone at the Louisville facility, most likely the warehouse employees and drivers. The fact that a warehouse employee (Braden) visits the counter area about four or five times a day to turn in tickets and discuss order problems not only demonstrates that warehouse employees have regular work related contact with counter employees, but it also is indicative of the functional integration of the two groups.^{17/}

^{17/} There is nothing in the record to suggest that Braden's contact with the counter employees is atypical of the other warehouse employees.

The record further shows that two counter employees held positions as drivers and warehouse employees prior to being transferred to the counter and that a counter employee regularly fills in for warehouse employees and drivers when necessary. This evidence demonstrates a high degree of employee interchange between the counter employees and the drivers and warehouse employees sought by the Petitioner. Further, the evidence concerning commonality of supervision, wages, hours and benefits as well as the degree of interchange and work related contact establishes that the counter employees share a strong community of interest with the warehouse employees and drivers. Indeed, the counter employees' community of interest with the warehouse employees and drivers is greater than that they share with the excluded outside sales people. Finally, it is clear from the record that the counter employees do not enjoy such a separate community of interest to warrant representation in a separate bargaining unit. *Overnite Transportation Co.*, supra.^{18/}

Although the counter employees are not required to wear uniforms and their primary job function does not involve manual labor, as is the case with the drivers and warehouse employees, I view these differences as being only minimally significant when compared to the otherwise strong community of interest shared between the two groups. Accordingly, I conclude that the community of interest between the counter employees and the drivers/warehouse employees sought by the Petitioner is so significant as to require their inclusion in the same unit. I shall, therefore, include the counter employees in the unit.

I shall, therefore, direct an election among the employees in the following unit:

All drivers, warehouse employees and counter employees employed by the Employer at its 620 Industry Road, Louisville, Kentucky facility, but excluding office clerical employees, the warehouse manager and all professional employees, guards and supervisors as defined in the Act.

^{18/} The Petitioner's reliance on *Wick's Furniture*, 255 NLRB 545 at n. 2 and at 548 (1981) to support its contention that the counter employees should be excluded from the unit of drivers and warehouse employees is misplaced. In *Wicks*, the Board affirmed the Regional Director's exclusion of will-call clerical employees from a unit of warehouse employees on the basis that the will-call clericals had a closer community of interest with electronic data processing employees and front office clericals who were excluded from the unit. The Petitioner argues that in the instant matter, the duties of the counter employees are more closely related to the duties of the outside sales employees than they are to the drivers and warehouse employees. While the duties of the counter employees and the outside sales employees may be similar to the extent that they both are involved in sales, the lack of detail in the record concerning the outside sales employees prevents me from accurately assessing their community of interest with the counter employees. The record affirmatively establishes, however, that the counter employees share common supervision with the drivers and warehouse employees which is different from the supervision of the outside sales employees, a strong indication that the counter employees' community of interest lies with the former as opposed to the latter. In any event, the evidence establishes a strong community of interest between the counter employees and the drivers/warehouse employees and does not establish such a strong community of interest between the counter employees and the outside sales employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Teamsters Local 89, affiliated with the International Brotherhood of Teamsters, AFL-CIO.**

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Woman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB No. 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **October 3, 2001**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the

Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **October 10, 2001**.

Dated at Cincinnati, Ohio this 26th day of September 2001.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
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